

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

January 27, 2004

IN RE:

**IMPLEMENTATION OF THE FEDERAL
COMMUNICATIONS COMMISSION'S
TRIENNIAL REVIEW ORDER – 9
MONTH PROCEEDING – SWITCHING**

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**DOCKET NO.
03-00491**

**ORDER DENYING THE REQUEST OF AENEAS
COMMUNICATIONS, INC. TO RECOVER COSTS**

This docket is before the Hearing Officer for consideration of the request of Aeneas Communications, Inc. ("Aeneas") contained in its *Response of Aeneas Communications, LLC. to Subpoena Duces Tecum Issued on Behalf of BellSouth on November 14, 2003* to recover costs associated with responding to the subpoena duces tecum served on Aeneas Communications, LLC by BellSouth Telecommunications, Inc. ("BellSouth") on November 14, 2003.

On November 14, 2003, BellSouth caused a subpoena duces tecum to be served on Aeneas. The subpoena requested the production of information related to Aeneas's use of switching. On December 10, 2003, Aeneas filed its responses to discovery with the Authority and filed *Response of Aeneas Communications, LLC. to Subpoena Duces Tecum Issued on Behalf of BellSouth on November 14, 2003* ("Response"). In its Response, Aeneas asserts that the requests are unduly burdensome and not reasonably calculated to the lead to the discovery of relevant evidence. Despite these objections, Aeneas states that it has attempted to respond and that attempt involved the efforts of five (5) employees and shut down several administrative operations for six (6) hours. As a result, Aeneas moves pursuant to Rule 45.02 of the Tennessee Rules of Civil Procedure that its responses be retained in a locked filing cabinet at the Tennessee Regulatory Authority until BellSouth remits to Aeneas six-hundred dollars (\$600) as compensation for assimilating and providing the requested information.

At the January 5, 2004 Authority Conference, the Hearing Officer inquired of BellSouth whether it intended to respond to Aeneas's motion. BellSouth stated that it had not interpreted Aeneas's Response as a motion and that it would like an opportunity to respond.¹ On January 14, 2003, BellSouth filed its response. In the response, BellSouth contends that Aeneas's motion should be denied because it does not comply with Rule 45.02. BellSouth asserts that Rule 45.02 requires that a motion be filed before the time for compliance and that Aeneas filed its motion two days after the time for compliance.² BellSouth also argues that the filing of the motion is inconsistent with the procedure set out in Rule 45.02. Specifically, BellSouth asserts that the rule contemplates the filing of a motion to quash or modify by the subpoenaed party and a finding that the subpoena is unreasonable and oppressive in advance of the decisionmaker awarding costs.³ BellSouth's final argument is that Aeneas has failed to establish that the subpoena is unreasonable and oppressive.⁴

The Hearing Officer finds that BellSouth's position as to the timing of the request is well-taken. The rule clearly anticipates that a motion seeking compensation for responding to a subpoena be filed in advance of the time provided for responding to the subpoena. Rule 45.02 provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and **in any event at or before the time specified in the subpoena for compliance therewith**, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.⁵

This requirement is reasonable in that it protects both parties. To explain, it reduces the risk that the producing party will compile the information only to have a decisionmaker grant a motion to quash or modify. Further, the procedure provides the party issuing the subpoena an opportunity to withdraw or

¹ See Transcript of Proceedings, January 5, 2004, pp. 5-6 (Authority Conference).

² See *BellSouth Telecommunications, Inc.'s Memorandum in Opposition to Aeneas Communications, LLC's Motion for Compensation Regarding Responses to Subpoena Duces Tecum*, 3-4 (Jan. 14, 2004).

³ See *id.* at 5.

⁴ See *id.* at 6.

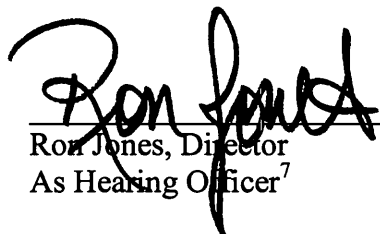
⁵ Tenn. R. Civ. P. 45.02.

modify the subpoena in the event the decisionmaker conditions denial of a motion to quash or modify on the payment of costs.

Lastly, Aeneas has not demonstrated any ground for requiring BellSouth to pay Aeneas's costs. Aeneas's assertions that the requests are unduly burdensome and not reasonably calculated to lead to the discovery of relevant evidence are not supported with sufficient facts or legal citation. The fact that responding to the subpoena required five (5) employees to spend six (6) hours assimilating information does not necessarily result in the conclusion that the requests are not reasonable. Moreover, information regarding competing carriers' switches and use of switching is certainly relevant to the determination of whether such carriers are impaired without access to the incumbent's switches.⁶ Based on these findings and conclusions, the Hearing Officer finds that Aeneas's motion should be denied.

IT IS THEREFORE ORDERED:

The motion of Aeneas Communications, LLC contained in the *Response of Aeneas Communications, LLC. to Subpoena Duces Tecum Issued on Behalf of BellSouth on November 14, 2003* to recover costs associated with responding to the subpoena duces tecum served on Aeneas Communications, LLC by BellSouth Telecommunications, Inc. on November 14, 2003 is denied.



Ron Jones, Director
As Hearing Officer⁷

⁶ *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 19,020, paras. 498-520 (2003) (Report and Order).

⁷ During the September 22, 2003 Authority Conference, a panel of the Tennessee Regulatory Authority consisting of Chairman Deborah Taylor Tate and Directors Pat Miller and Ron Jones unanimously voted to appoint Director Ron Jones as the Hearing Officer to prepare the switching portion of this case for a hearing by the panel. *Order Appointing Hearing Officer* (Nov. 13, 2003).